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No. 00-973

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ALPHONSO VONN,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant's challenge to his guilty plea based on a violation of Rule 11 is subject to plain-error review under Rule 52(b) if he failed to object to the violation in the district court.

2. Whether the nature of prejudice to be assessed when a guilty plea is taken in violation of Rule 11 is whether the defendant would have pleaded guilty absent the error.

3. Whether, in determining the existence of prejudice when a guilty plea has been taken in violation of Rule 11, the reviewing court is restricted to the transcript of the Rule 11 colloquy or may consider other matters.

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INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives is promotion of the proper administration of justice.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1994 & Supp. III 1997) (amended 2000), and the Sixth Amendment of the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the NAFD's missions is to file amicus curiae briefs to ensure that the position of indigent

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[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, have made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

defendants in the criminal justice system is adequately represented.

SUMMARY OF ARGUMENT

1. The history of Rule 11, including Rule 11(h), supports the proposition that the guilty plea process is viewed as different from other criminal procedures, given the gravity of the plea and the nature of rights being surrendered. This history has never wavered from the paramount need to ensure, at the time of the plea, that the defendant is acting knowingly and voluntarily. Commensurate with this need has been the policy in favor of the development, at the time of the plea, of a detailed and complete record to demonstrate the reliability of that proceeding. The broad reading of Rule 11(h) urged here by the government, whereby a reviewing court could look outside the record of the plea colloquy to determine whether a failure to comply with Rule 11(c) was "harmless," would mark a departure from this history and the policy it reflects.

2. Coupled with this history, several additional developments support the need for incentives that would drive trial courts to diligently follow the procedures for taking guilty pleas set forth in Rule 11. These developments include the large increase in guilty pleas shadowing the rising number of criminal convictions in the federal system in recent years, the increased collateral importance of those guilty pleas under several federal sentence enhancement laws, and restrictions placed on defendants who wish to contest guilty pleas entered earlier in the context of federal and state sentence enhancements. The Petitioner's position, lacking clear guidance regarding the proper scope of record review of Rule 11 challenges, would serve to overburden appellate courts already struggling under the weight of increased criminal appeals and

would serve to undercut, rather than enhance, the reliability of guilty pleas.

3. Several other judicial administrative interests are served by a narrow construction accorded to Rule 11(h). Judicial economy warrants the imposition of continued incentives upon district courts to "get it right the first time" during the plea colloquy. Permitting *post hoc* examination of extraneous evidence on appeal regarding a defendant's state of mind during the plea colloquy would not provide that incentive and would overburden courts. Moreover, adoption of the broad construction urged by the government would lower the level of protection afforded to defendants who are waiving constitutional rights at the time of their pleas. Finally, a broad construction would not properly respect the need for reliability and integrity of the plea process itself.

ARGUMENT

I. THE EVOLUTION OF RULE 11 AND THE DECISIONS OF THIS COURT EMPHASIZE THE NEED TO ENSURE, AT THE TIME THE GUILTY PLEA IS TENDERED, THAT THE DEFENDANT IS ACTING KNOWINGLY AND VOLUNTARILY.

A. Initial Promulgation of Rule 11 and the 1966 Amendments.

The history of Rule 11 evidences an intent to place special emphasis on the importance of the guilty plea process. This emphasis is necessary to ensure that, at the time the plea is taken, the procedure utilized by the trial court possesses the necessary attributes of solemnity and elicits a knowing voluntariness on the part of the defendant to support the waiver of

rights that pleading guilty entails. In 1946, when the Federal Rules of Criminal Procedure became effective, Rule 11 set forth the general admonition that "the court . . . shall not accept [a guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." FED. R. CRIM. P. 11, 18 U.S.C. app. 3748 (1964) (amended 1966, 1975, 1979, 1980, 1982, 1983, 1985, 1987, 1988, 1989). Rule 11 was considered at the time to be a "restatement of existing law and practice." *See* FED. R. CRIM. P. 11 advisory committee's note 1 (1944) (citing *Fogus v. United States*, 34 F.2d 97, 98 (4th Cir. 1929)). But the codification solidified the view that a plea of guilty is a solemn event that carries with it significant consequences and therefore requires the implementation of certain procedures *by the court taking the plea*. As this Court had explained years earlier:

> A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. . . . Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.

Kercheval v. United States, 274 U.S. 220, 223-24 (1927). The lower courts followed this direction. *See, e.g., Durant v. United States*, 410 F.2d 689, 691 n.4 (1st Cir. 1969); *Heideman v. United States*, 281 F.2d 805, 808 (8th Cir. 1960).

The initial policy set forth in Rule 11 was refined in the 1966 amendments to solidify the role of the trial court taking the plea. These amendments specified that the district court must address a defendant *personally* and ensure that the defendant understands "the consequences of the plea." FED. R. CRIM. P. 11 advisory committee's notes (1966) (internal quotation omitted). This modification of the rule was consistent with earlier doctrine emphasizing the role of the court taking the plea. Indeed, this Court later observed that by requiring a district judge to personally address the defendant, "not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack." *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

Echoing this Court's statement quoted above from *Kercheval*, the commentary accompanying the 1966 amendments included a reminder of the frequency of guilty pleas in our criminal justice system, and the commensurate need to ensure that they were properly obtained. *See id.* Thus, "[t]rial courts have a duty to do more than simply listen to an articulation or a verbalization of a plea of guilty by a defendant; they have a duty to insure that the defendant understands the consequences of his act." *United States ex rel. Crosby v. Brierley*, 404 F.2d 790, 794 (3d Cir. 1968). The rule did not contain at that time, however, specific queries required of district courts to fulfill that duty.

B. *McCarthy v. United States* and *Boykin v. Alabama*.

This Court issued two seminal rulings during the 1968 Term related to the taking of guilty pleas that further etched in stark relief the unique importance of procedures surrounding the taking and acceptance of guilty pleas. Read together, *McCarthy v. United States*, 394 U.S. 459 (1969), a federal case, and *Boykin v. Alabama*, 395 U.S. 238 (1969), a state habeas case, emphasized the need for the trial court to ensure that the record of the plea proceeding demonstrates that the defendant acted knowingly and voluntarily and that a factual basis existed

for the plea. Not only did this requirement serve important reliability and judicial administration interests, but strict compliance with the trial judge's duty served important constitutional interests as well.

In *McCarthy*, this Court examined the proper remedy for a failure by a district court to comply with Rule 11. On direct appeal, McCarthy claimed that the trial judge failed to address him personally during the plea colloquy and accepted his plea without first establishing that there was a sufficient factual basis. *See* 394 U.S. at 462. The Seventh Circuit rejected his claim.

This Court found that the trial judge failed to personally inquire of McCarthy whether he understood the nature of the charges against him, and held that "*any* noncompliance with Rule 11 is reversible error." *Id.* at 464 n.9 (emphasis added). It rejected the government's argument that the district court could simply "assume," based on the fact that the defendant stated his intention to plead guilty and was informed of the consequences of his plea, that the defendant understood the nature of the charges against him. Central to the Court's analysis was its discussion of Rule 11's "two purposes": "[I]t is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary [and] is intended to produce *a complete record at the time the plea is entered* of the factors relevant to this voluntariness determination." *Id.* at 465 (emphasis added and footnotes omitted).[2] The Court noted that the "personal interrogation" amendment adopted in 1966 "quite obviously" furthers those two purposes, which have their "genesis" in the

[2] At least two circuit courts have noted the prophylactic value of such a complete record at the time the plea is entered. *See United States v. Bernal*, 861 F.2d 434, 437-38 (5th Cir. 1988); *Carreon v. United States*, 578 F.2d 176, 180 (7th Cir. 1978).

"nature" of a guilty plea. 394 U.S. at 466. In this important regard, the Court explained as follows:

> To the extent that the district judge . . . exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary.

Id. at 467. Subsequent determination of the defendant's state of mind was *not* acceptable, as it would undercut the reliability of the process:

> As the Court of Appeals for the Sixth Circuit explained . . . : *When the ascertainment is subsequently made, greater uncertainty is bound to exist since in the resolution of disputed contentions problems of credibility and of reliability of memory cannot be avoided* * * *. There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him.

Id. at 469-70 (first emphasis added and internal quotations and citations omitted).

Shortly after the Court in *McCarthy* took steps to enhance procedural requirements applicable during plea proceedings in federal court, a decision which served both reliability and judicial administration interests, the Court decided *Boykin*, a habeas corpus case which involved a guilty

plea tendered in state court. During the plea colloquy in *Boykin*, the trial court "asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." *Boykin*, 395 U.S. at 239. In holding that it was reversible error if "the record" fails to disclose that the defendant knowingly and voluntarily entered his plea, the Court emphasized that "[s]everal federal constitutional rights" are waived when a defendant pleads guilty. *See id.* at 242-43. Consistent with its pronouncements in *McCarthy*, the *Boykin* Court cited the need for reliability in the taking of the plea, and the difficulties in administration of a rule that rested upon *post hoc* attempts to discern a defendant's intent and state of knowledge at the time of the plea. *See id.* at 243-44.

C. The 1975 Amendments to Rule 11.

In the wake of and consistent with this Court's 1969 rulings—which stressed the need for certainty at the time of the plea that the defendant was acting knowingly and voluntarily, highlighted the constitutional values at stake, and set forth the administrative benefits served by a clear record—the 1975 revisions to Rule 11(c) served to further ensure "that the defendant who pleads guilty has made an informed plea." FED. R. CRIM. P. 11 advisory committee's notes (1974). Specifically, the 1966 "advice to defendant" provision was expanded to require a district court to also personally inquire of the defendant about his understanding of several enumerated rights, thereby reaffirming the central role of the trial court in the "solemn act" of pleading guilty. *See id.*; *United States v. Prior*, 107 F.3d 654, 657 (8th Cir. 1997).[3]

[3] Prior to this time, given the text of Rule 11 and case law, the objectives of Rule 11—reliability and ease of administration—may have (continued...)

D. *United States v. Timmreck.*

From 1969 until 1974, virtually every circuit faced with an appeal that was based on a failure of the district court to comply with Rule 11's requirements, whether by way of direct appeal or collateral attack, held that *McCarthy* required the guilty plea to be vacated. *See, e.g., United States v. Richardson*, 483 F.2d 516, 519-20 (8th Cir. 1973); *United States v. Cody*, 438 F.2d 287, 289 (8th Cir. 1971). Many of these decisions acknowledged the importance of conducting a proper plea colloquy and the need for district courts to fully comply with the mandates of Rule 11. *See, e.g., Irizarry v. United States*, 508 F.2d 960, 964 (2d Cir. 1974) (amended 1975).

After 1974, however, when the Court decided *Davis v. United States*, 417 U.S. 333 (1974), several circuits began to view Rule 11 errors differently on collateral review. In the course of holding that a change in the law of a circuit after a defendant's conviction may be asserted in a § 2255 proceeding, *see id.* at 347, the *Davis* Court stated:

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that *"collateral relief is not available when all that is shown is a failure to comply with the formal*

[3](...continued)
been apparent. But the procedures implemented by the district courts toward achievement of these ends were not, leading one commentator to observe that the taking of guilty pleas was plagued by "vague standards and broad discretion in the trial courts." Note, *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 60, 181 (1969).

> *requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error.* We suggested that the appropriate inquiry was whether the claimed error of law was "*a fundamental defect which inherently results in a complete miscarriage of justice,*" and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted).

Davis, 417 U.S. at 346 (emphasis added and alterations in original).[4]

Despite the fact that *Davis* involved neither a Rule 11 issue nor the policies underpinning that provision, some circuits interpreted the above-quoted passage as an indication that a different standard of review was to be applied to collateral attacks raising Rule 11 violations. *See, e.g., Del Vecchio v. United States*, 556 F.2d 106, 110-11 (2d Cir. 1977). Others, however, continued to rely on *McCarthy*'s "automatic-reversal rule" in such contexts. *See, e.g., Bunker v. Wise*, 550 F.2d 1155, 1156-57 (9th Cir. 1977).

In 1979, the Supreme Court in *United States v. Timmreck* sought to resolve this conflict by addressing "whether a conviction based on a guilty plea is subject to collateral attack whenever it can be shown that Rule 11 . . . was violated when the plea was accepted." 441 U.S. 780, 781

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[4] *Hill v. United States*, 368 U.S. 424 (1962), concerned a failure by the district court to afford a defendant at sentencing an opportunity to allocute, as required by Rule 32(a). The Court in that case explained that such an error "is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus." *Id.* at 428.

(1979). At the plea hearing in *Timmreck*, the district court failed to describe the mandatory minimum three-year special parole term required by the applicable statute. *See id.* at 782. The defendant took no direct appeal of his conviction or sentence. Two years later, the defendant moved pursuant to § 2255 to vacate his sentence, alleging that the district court had violated Rule 11. *See id.* Without reference to *Davis*, this Court stated that because the case involved a collateral attack, "[t]he reasoning in *Hill* is equally applicable to a formal violation of Rule 11." *Id.* at 783.

In the instant case, the government contends that *Timmreck* "significantly undercut a major justification for the automatic-reversal rule adopted in *McCarthy*," that being the alleviation of administrative burdens placed on habeas courts when called upon to determine challenges to guilty pleas on collateral attack. (*See* Br. for Pet. at 25-26.) But this is not necessarily so, as lower courts have frequently limited *Timmreck* to its unique facts. *See, e.g., United States v. Walsh*, 733 F.2d 31, 32-34 (6th Cir. 1984). *Timmreck* did not involve the situation presented here, regarding the scope of review on direct appeal of the failure to advise the defendant of his constitutional right to counsel. Indeed, the *Timmreck* Court expressly stated that the defendant's claim in that case "could have been raised on direct appeal." *Timmreck*, 441 U.S. at 784. Also, *Timmreck* did not involve a situation where the defendant alleged that he was actually ignorant of facts that should have been explained at the time of the plea in order to ensure in keeping with the Rule's dictates that the plea was knowing and voluntary. Nor did it involve, accordingly, the question of what quantum of evidence was required to support or undermine the defendant's subsequent claim of ignorance at the time of the plea.

E. The Adoption of Rule 11(h).

Rule 11(h), the "harmless error" provision at issue in this case, was added in 1983. It provides that "[a]ny variance from the procedures required by [Rule 11] which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 11(h). Aware of Rule 52(a), the generic harmless error rule, the advisory committee included the following explanation in support of Rule 11(h):

> Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (alteration in original). This disagreement, as discussed above, stemmed primarily from "uncertainty as to the continued vitality and reach of *McCarthy*," which never cited nor discussed Rule 52(a).[5] FED. R. CRIM. P. 11 advisory committee's notes (1983).

The commentary accompanying the 1983 amendments makes clear that Rule 11(h) was enacted to "reject[] the extreme sanction of automatic reversal" mandated by *McCarthy*, in light of the enhanced Rule 11 requirements established in 1975:

> Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. . . . [T]he chances of a *truly* harmless error . . . are much greater under present Rule 11 than under the version before the Court in *McCarthy*. . . . A plea of [guilty] should not be overturned, *even on direct appeal*, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (second emphasis added).

The Advisory Committee, however, did not indicate that where, as here, the district court failed to advise the defendant of important rights, the error could be harmless, or that facts outside the colloquy record could be adduced in support of such a determination. Indeed, despite the indication that Rule 11(h) was intended to reduce the impact of *McCarthy*, the provision "may not be applied to nullify or dilute important Rule 11 safeguards." *United States v. Jaramillo-Suarez*, 857 F.2d 1368, 1371 (9th Cir. 1988). Thus, "the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited." FED. R. CRIM. P. 11 advisory committee's notes (1983). Several examples of harmless deviation from the Rule were provided, such as where the district court failed to inform the defendant of his rights under Rule 11(c)(5), which "has no bearing" on the validity of the plea itself. *See id.*

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[5] Some courts viewed *McCarthy* as superseding Rule 52(a) in the guilty plea context, while others deemed Rule 52(a) controlling. *See, e.g., United States v. Coronado*, 554 F.2d 166, 173 (5th Cir. 1977); *United States v. Journet*, 544 F.2d 633, 636-37 (2d Cir. 1976).

This guidance was consistent with the context that "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). In that regard, the advisory committee noted a particular caution:

> [S]ubdivision (h) should *not* be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true . . . that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice . . . . Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

FED. R. CRIM. P. 11 advisory committee's notes (1983) (emphasis in original). These admonitions have been reflected in the case law. *See United States v. Corbett*, 742 F.2d 173, 179 n.14 (5th Cir. 1984) (per curiam) ("Rule 11(h), as applied to core concerns, is designed to forgive inadequate addresses, not entire failures." (internal quotations omitted)); *United States v. Odedo*, 154 F.3d 937, 940 (9th Cir. 1998) ("Subdivision (h) makes *no change* in the responsibilities of the judge at Rule 11 proceedings . . . . Thus we hold that the Rule 11(h) 'harmless error' standard applies to all Rule 11 errors, regardless of whether they were ever raised before the district court." (internal quotation omitted)).

F. This History Does Not Support the Government's Argument That Material Outside the Plea Hearing Record Should Be Reviewed on Direct Appeal.

In its brief, the government contends that the Ninth Circuit, in determining whether the district court's failure to comply with Rule 11 constituted reversible error, improperly limited its review on appeal to the guilty plea record. (*See* Br. for Pet. at 11.) Central to this contention is the government's argument that "[t]here is no reason why a reviewing court should refuse to consider" matters beyond the record of the plea proceeding. (*Id.* at 15.) As demonstrated above, however, this argument is inconsistent with the development of Rule 11 and the decisions of this Court. The version of the rule that became effective in 1946 and the amendments in 1966 and 1975 all were adopted with a view towards emphasizing the need for special procedural safeguards surrounding the guilty plea process.

The government urges this Court to approve a scope of appellate review that would be inconsistent with the principles set forth above. Nothing in *Timmreck* undercuts the constitutional issues that arise in the context of a guilty plea. The decision, which the government cites in support of its contention that the alleviation of administrative burdens placed on habeas courts should no longer be of major concern to this Court, did not involve a direct appeal and does not answer the question of whether the Court should approve of an examination of matters beyond the record of the plea proceeding itself.

Nor does Rule 11(h), which was adopted simply to reject the extreme sanction of *automatic* reversal mandated by *McCarthy*, provide support for a scope of review envisioned by the government. The provision was intended to be applied in a limited category of situations, where non-constitutional

procedural niceties were inadvertently not followed, and does not touch upon the issue of whether looking outside the plea proceeding record furthers the proper administration of justice.

In sum, the government's position is untenable, in light of the long-recognized need for reliability in the plea process, the potential administrative burdens, and the underlying constitutional issues. As one court has noted, "[t]he dictates of Rule 11 and the federal policy of fair and efficient judicial administration require that the reviewing court look solely to the record of the plea proceeding." *United States v. Kamer*, 781 F.2d 1380, 1383 (9th Cir. 1986).

II. HEIGHTENED IMPACT OF GUILTY PLEA CONVICTIONS SUPPORTS A NARROW READING OF RULE 11(h).

The history cited above shows that procedures governing the acceptance of guilty pleas have been an area meriting special attention to ensure reliability in the plea process and ease of review after the plea. In addition, several other factors work to militate against the broad interpretation of Rule 11(h) urged by the government. These factors are (i) the increased reliance upon guilty pleas in an already overburdened criminal justice system; (ii) the heightened impact of guilty pleas due to sentence enhancement laws; and (iii) recent restrictions on a defendant's ability to collaterally attack the validity of his or her guilty plea used in federal and state sentence enhancements. These factors favor the more narrow construction of Rule 11(h) urged by Respondent when, as here, the district court failed to advise Respondent of constitutional rights as required by Rule 11(c)(3).

A. Growth in Conviction Rate and Increased Reliance upon Guilty Pleas.

Now more than ever before, guilty pleas permit our overburdened criminal justice system to function with a semblance of order. Since the adoption of the United States Sentencing Guidelines in 1984, there has been a steady increase in the number of criminal defendants convicted in the federal courts. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1999, at 429 tbl.5.30. Over the last decade, the number of federal convictions has grown from 47,486 in 1990 to 67,036 convictions in 2000. *See infra* pp. A-1 to A-2 tbl.1. This rising tide in criminal convictions is pertinent to the administrative issues related to Rule 11 because most federal convictions are obtained by guilty plea. Since 1984, the guilty plea rate for federal crimes has hovered at or near 90%. *See* SOURCEBOOK *supra*, at 429 tbl.5.30 (showing convictions and dispositions by guilty plea for 1984 through 1999). Since 1994, federal guilty plea rates have exceeded 90%, peaking in 1999 to approximately 95%. *See infra* pp. A-1 to A-2 tbl.1. In 2000, the federal guilty plea rate remained at 95%. *See id.*[6]

The recent trend of a 95% federal guilty plea rate signals that the plea bargaining process continues to be fundamental to the efficient administration of criminal justice in the United States. *See Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 752-53 (1970); FED. R.

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[6] The conviction rate is also rising at the state level. For example, in 1988, there were 667,366 state felony convictions. By 1996, the number of state felony convictions skyrocketed to 997,970, representing an increase of approximately 67%. *See infra* p. A-3 tbl.2. Similar to their federal counterparts, approximately 90% of state criminal defendants pleaded guilty rather than going to trial from 1988 to 1996. *See id.*

CRIM. P. 11 advisory committee's notes (1974). Because the overwhelming percentage of federal criminal convictions are obtained by guilty plea, the importance of ensuring that each plea proceeding is conducted in compliance with Rule 11's requirements has become paramount, both to secure the defendant's rights, as observed above, and to avoid overburdening appellate courts with meritless appeals. *See McCarthy v. United States*, 394 U.S. 459, 465 (1969) ("[T]he more meticulously [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.").

To expand the Rule 11(h) inquiry on appeal beyond the scope of the Rule 11 hearing, (*see* Br. for Pet. at 42), would not encourage the trial court to exercise due care in conducting the Rule 11 hearing in the first instance. Such an approach would, however, overlook the unique function of the plea colloquy and the court's strict duty to assess the defendant's understanding of his core constitutional rights *at the time the plea is taken*. Petitioner has cited no authority from the Rule 11(h) or guilty plea context that supports its broad view, which would authorize litigants to bring *any* arguably pertinent information to the attention of the reviewing court. A broad construction of Rule 11(h), to include sources other than the Rule 11 plea record, would increase the workload for reviewing courts and commensurately decrease the level of reliability concerning what the defendant actually knew at the time of the plea and, foremost, whether the plea was in fact knowing and voluntary.

B. Sentencing Enhancements Involving Prior Convictions.

The concern expressed above becomes more acute when one considers the heightened impact convictions—obtained

overwhelmingly as a result of guilty pleas—have today given the increased incidence of sentence enhancement laws. Under federal law, a convicted defendant who has previously pleaded guilty may face a longer sentence under, for example, the United States Sentencing Guidelines (Guidelines), the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (1994 & Supp. IV 1998), or certain other provisions.

The Guidelines provide specific ranges for sentencing and mandate sentence enhancement based, in part, on a defendant's criminal history. *See Koon v. United States*, 518 U.S. 81, 88 (1996); U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1, 4A1.1 (2000) [hereinafter GUIDELINES MANUAL]. The Guidelines further provide enhanced sentences for a "career offender" and convicted defendants with "criminal livelihoods."[7] Other examples of federal laws imposing adverse consequences upon defendants at sentencing based, in part, on their prior criminal histories include the ACCA, the federal Three Strikes Law, 18 U.S.C. § 3559(c) (1994 & Supp. IV 1998), and section 1010(b) of the Controlled Substances Import and Export Act, 21 U.S.C. § 960(b) (1994 & Supp. IV 1998) (amended 2000).[8]

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[7] "Career offenders" are defined as defendants who have committed a felony involving a crime of violence or a controlled substance offense with two or more prior felonies involving violence or a controlled substance offense. GUIDELINES MANUAL, *supra*, § 4B1.1; *see United States v. LaBonte*, 520 U.S. 751, 754 (1997). Defendants with "criminal livelihoods," defined as individuals who have engaged in a pattern of criminal conduct, also receive enhanced sentences under the Guidelines. GUIDELINES MANUAL, *supra*, § 4B1.3; *see United States v. Burgess*, 180 F.3d 37, 41 (2d Cir. 1999).

[8] *See, e.g., Custis v. United States*, 511 U.S. 485, 490-98 (1994) (describing the ACCA's mandatory 15 year sentence for felon in possession

(continued...)

The Guidelines and statutes described above underscore the added impact of guilty pleas and the commensurate need for reliability in the plea process, as prior convictions (again, mostly procured by guilty plea) may later be used to enhance sentences in the federal courts. Thus, trial courts imposing enhanced sentences must have confidence in the integrity of the guilty plea taken earlier. *See McCarthy*, 394 U.S. 459, 465 (1969). The best method of assuring that a defendant was actually aware of his or her rights at the time of the plea is for the trial court to advise the defendant of those rights during the plea colloquy itself—thereby creating a permanent record of the plea proceeding that can be efficiently used to assess any post-conviction challenge. *Id.*

C. Restrictions on the Ability to Collaterally Challenge Prior Guilty Pleas.

In conjunction with the sentence enhancements discussed above, a defendant's ability to collaterally challenge the validity of a guilty plea, particularly in the context of its subsequent use for sentence enhancement purposes, has been restricted by this Court in the last decade. This development

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[5](...continued)
of a firearm who has three prior convictions for a violent felony or serious drug offense); *United States v. Gatewood*, 230 F.3d 186, 188 (6th Cir. 2000) (en banc) (detailing federal Three Strikes Law as mandating life imprisonment where the defendant has at least two prior felonies involving violence or a serious drug offense); *United States v. De Veal*, 959 F.2d 536, 538 (5th Cir. 1992) (describing § 960(b) enhancement). In addition, most states have habitual offender laws that require sentence enhancements for state criminal defendants with prior convictions, including those convictions obtained by guilty pleas—including those obtained in federal court. Indeed, forty-four states and the District of Columbia have some version of this type of legislation. *See infra* pp. A-4 to A-16 tbl.3.

further emphasizes the importance of requiring district courts to closely adhere to Rule 11 mandates in the first instance and the need for this Court to provide guidance to appellate courts to review Rule 11 errors raised on direct appeal under a narrowly tailored Rule 11(h) harmless error standard limited to the reliable record of the plea colloquy. Since 1992, the Court has handed down five decisions that have greatly restricted the ability of a convicted defendant to raise Rule 11 challenges on collateral attack or otherwise seek to withdraw a guilty plea. These cases are discussed below.

1. *Parke v. Raley.*

In *Parke v. Raley*, this Court reversed the lower court's ruling that unavailability of the plea hearing transcripts at sentencing implied that the defendant was not advised of his rights during the initial plea colloquies. 506 U.S. 20, 30 (1992). The Court instead applied a presumption of regularity to the earlier plea proceedings and ruled that the convictions offered for sentencing purposes were validly obtained. *Id.* ("[[T]]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears." (internal quotation omitted)). In so doing, the Court drew a distinction between "the presumption of invalidity" applied in *Boykin* to cases on direct review and "the presumption of regularity that attaches to final judgments" being challenged for the first time on collateral review. *Id.* at 29 (internal quotation omitted).

The *Parke* decision explicitly presumed, following final judgment, that the underlying plea proceeding was properly conducted. *Id.* This presumption reflects the underlying recognition that there must be a high degree of reliability in the initial plea proceeding and a high degree of certainty that the proceeding was conducted properly. In the Rule 11 context,

this recognition must be buttressed with incentives for the district courts to follow the strictures imposed by the rule. The broad interpretation of Rule 11(h) urged by Petitioner would *not* provide such incentives. Indeed, such a broad interpretation would provide incentives for courts to take a more casual approach to the rule, however inadvertently or unintentionally. As noted above, *see supra* Part I.E, this is in direct conflict with the history of the rule.

2. *Custis v. United States.*

Custis v. United States, 511 U.S. 485 (1994), also involved the issue of a sentence enhancement based on prior state convictions obtained by guilty plea. Custis collaterally attacked the validity of his prior guilty plea convictions at his federal sentencing proceeding. *See id.* at 490-91.

This Court held that the validity of previous state convictions could not be revisited during federal sentencing proceedings unless the defendant alleges that he was denied counsel when he entered into his guilty pleas. *Id.* at 495-96. In finding that a defendant may seek to collaterally attack a guilty plea where there was a failure to appoint counsel, the Court noted that under controlling precedent, "there has been a theme that failure to appoint counsel for an indigent defendant [represents] a unique constitutional defect." *Id.* at 496.

In concluding that prior convictions not set aside on direct appeal or collateral review are presumptively valid for the purposes of enhancing a federal sentence under the ACCA, the *Custis* decision relied on a presumption of finality accorded to final judgments. As in *Parke*, the *Custis* Court acknowledged the reoccurring theme that failure to promote the concept of finality of judgment would "undermine confidence in the integrity of [plea hearing] procedures and inevitably delay and

impair the orderly administration of justice." *Id.* at 497 (internal quotation omitted).

3. *United States v. Hyde.*

In *United States v. Hyde*, the defendant sought to withdraw his guilty plea after the district court had accepted the plea but before it accepted the plea agreement, on which it deferred decision until the completion of the pre-sentence report. 520 U.S. 670, 672 (1997). This Court reversed the lower court, holding that, following acceptance of the plea by the district court, defendant must show a "fair and just reason" pursuant to Rule 32(e) for withdrawal. *Id.* at 676. By so holding, the Court reemphasized the need to promote the integrity of the plea hearing process recognized in *Custis*, and the "serious act" of entering a guilty plea. *See id.* at 676-77.

4. *Bousley v. United States.*

Bousley v. United States, involved a habeas claim to vacate sentences following the entry of guilty pleas. 523 U.S. 614, 617 (1998). Challenging the validity of his guilty plea conviction for the first time on collateral review, Bousley claimed that the plea was invalid because he was misinformed by the district court about the elements of the offense. *Id.* at 617-18.

This Court held that Bousley's claim was procedurally defaulted because he failed to raise it on direct appeal and that it could be reviewed on its merits only if Bousley made a showing of "actual innocence." *Id.* at 623. The Court based its holding on the "concern with finality" related to "the limitation on collateral attack . . . [on] guilty pleas" in concluding that a claim based on the alleged uninformed nature of the plea could "be fully and completely addressed on direct review *based on*

the record created at the plea colloquy." *Id.* at 621-22 (emphasis added and internal quotations omitted). In *Bousley*, again, the Court stressed its concern with protecting the integrity of the plea hearing process and limiting the Rule 11(h) inquiry to the plea hearing record. *Id.* at 622.

5. *Daniels v. United States.*

Factually similar to *Custis* and *Bousley*, Daniels, a convicted felon, was sentenced under the ACCA, based, in part, on two prior state guilty plea convictions. *See Daniels v. United States*, 121 S. Ct. 1578, 1580 (2001). Daniels then brought a federal habeas petition challenging his sentence based on the alleged invalidity of his prior convictions. *See* 121 S. Ct. at 1580-81.

Following *Custis*, the Court held that Daniels could not bring a federal habeas claim based on the alleged unconstitutionality of prior state guilty pleas that were used to enhance the federal sentence, except where the predicate state convictions were obtained in violation of the right to counsel. *Id.* at 1583. The *Daniels* Court further held that a defendant had no recourse to challenge his prior convictions where they were no longer open to direct or collateral attack in their own right. *Id.* In *Daniels*, the Court again implicitly recognized the integrity of the plea hearing process, as demonstrated by its focus on the concern for the finality of judgments. The *Daniels* Court also acknowledged the difficulties inherent in expecting federal district courts presiding over sentencing hearings under the ACCA to accurately determine the "voluntariness" of defendants' prior state guilty pleas, particularly where those prior guilty pleas were up to fifteen years old and where the plea

transcripts were missing or otherwise unavailable. *Id.* at 1581-82.[9]

6. Construing Rule 11(h) Narrowly.

The five decisions discussed above have markedly restricted defendants' ability to extricate themselves from the collateral effects of guilty pleas. Taken as a whole, the decisions serve to place great emphasis on ensuring, at the time the plea is entered, that it is knowing and voluntary. Indeed, each of these cases demonstrate this Court's appreciation of the integrity and regularity of the plea hearing process in the first instance. *See, e.g., Custis,* 511 U.S. at 497; *Parke*, 506 U.S. at 30.

This presumption of regularity would be eroded in the Rule 11 context if courts were permitted to reach far beyond the record of the plea colloquy to attempt to reconstruct, through attenuated circumstantial evidence on a cold record, what the defendant understood at the time the plea was entered. To maintain the public's—and this Court's—confidence in the plea hearing process, the Court should continue to provide incentives for district courts to closely adhere to Rule 11's mandates and engage in meaningful plea colloquies that

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[9] Indeed, Respondent's case illustrates the difficulties in expanding the prejudice inquiry beyond the scope of the plea hearing. Petitioner argues that evidence other than the plea record should be taken into consideration when applying the Federal Rule of Criminal Procedure 11(h) standard. However, the very records that it asks the Court to take notice of, Respondent's initial appearance and arraignment proceeding transcripts, were not made available until *after* the Ninth Circuit had issued its initial opinion. (*See* Br. for Pet. at 38 n.18.) Consideration of extraneous evidence not readily available would cause undue delay, different treatment accorded appellants, and works against judicial economy interests.

adequately ensure that defendants' pleas are reliable and constitutional.

III. NARROWLY CONSTRUING THE APPLICATION OF RULE 11(h) SERVES IMPORTANT INTERESTS OF JUDICIAL ADMINISTRATION.

A. A Narrow Rule 11(h) Interpretation Promotes Judicial Economy.

The opinion below reflected a straightforward and reliable procedure for reviewing the harmlessness of Rule 11 errors:

> We have interpreted [Rule 11(h)] to mean that we must inquire whether the defendant was aware of his rights . . . .
>
> In determining what the defendant knew, we are limited to what the record of the plea proceeding contains. The requirements of Rule 11 are so easy to follow that we will not go beyond the plea proceeding in considering whether the defendant was aware of his rights.

United States v. Vonn, 224 F.3d 1152, 1155 (9th Cir. 2000) (internal quotation and citation omitted). Limiting the Rule 11(h) inquiry solely to the plea record provides trial courts with a specific framework in which to conduct the plea colloquy and provides a solid record for appellate courts to use in making efficient post-conviction Rule 11 determinations. Both these goals serve judicial economy interests. *See United States v. Kamer*, 781 F.2d 1380, 1384 (9th Cir. 1986); *United States v. Journet*, 544 F.2d 633, 636 (2d Cir. 1976).

In contrast, Petitioner's request to extend the Rule 11(h) prejudice inquiry to the entire case record—or other extraneous evidence—calls for an overly broad interpretation of Rule 11(h) that would return guilty plea voluntariness determinations on appeal back to an unworkable "totality of the circumstances" test, leading to inconsistent results and possibly further confusion among the circuits. Rule 11 was enacted to avoid the shortcomings of this test and to provide courts with a detailed framework to use in conducting their plea hearings.[10] *See United States v. Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977). In amending Rule 11(c) in 1975, as described above, *see supra* Part I.C, Congress intended to simplify the old Rule 11's general guidelines by enumerating specific advice to be administered by the court to the defendant at the time the plea was taken. *See Journet*, 544 F.2d at 636. In limiting the Rule 11(h) harmless error standard solely to the plea colloquy record, the appellate court is able to efficiently determine the merits of post-conviction Rule 11 challenges. *See, e.g., Kamer*, 781 F.2d at 1383.

Petitioner advocates an approach that would require courts on review to engage in *post hoc* reasoning concerning rights the defendant may or may not have known about at the time of his plea. This dilemma could easily be avoided by simple adherence to Rule 11's dictates by district judges in the first instance. *See Journet*, 544 F.2d at 636 ("[C]ompliance with F.R.Cr.P. Rule 11 should be relatively easy for any careful

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[10] Contrary to Petitioner's view (*see* Br. for Pet. at 43), presence of defendant's counsel at the plea hearing does not dispense with the necessity of the warning required by Rule 11(c)(3). *See, e.g., United States v. Alcaraz-Guerrero*, No. 99-50471, 2000 WL 1459749, at *1 (9th Cir. May 5, 2000) (unpublished per curiam table decision); *United States v. Wurth*, No. 94-5345, 1995 WL 323952, at *3 (4th Cir. May 31, 1995) (unpublished per curiam table decision).

district judge." (internal quotation omitted)). Absent such adherence, appellate courts would find themselves entertaining a large number of appeals regarding the defendant's state of knowledge during the plea colloquy in situations where original transcripts of proceedings other than the plea colloquy may have been lost or are otherwise unavailable. Nothing in the text or history of Rule 11(h) requires a contrary result such as the one sought by Petitioner here. *See United States v. Gastelum*, 16 F.3d 996, 998-99 (9th Cir. 1994) ("The [plea hearing] transcript provides all that is needed and all that is allowed for the resolution of [Rule 11(h) harmless error] claims." (internal quotation omitted)).

B. A Narrow Rule 11(h) Interpretation Ensures Defendants' Constitutional Rights Are Sufficiently Safeguarded.

The straightforward test used below ensures defendants' constitutional rights are sufficiently safeguarded and that the contemporaneous record reveals whether a defendant is truly knowledgeable about the consequences of his or her plea and the important constitutional rights that will be irrevocably waived. This test is also the best way to ensure that the integrity of the plea hearing process is respected and preserved. *See Custis v. United States*, 511 U.S. 485, 496 (1994); *United States v. Journet*, 544 F.2d 633, 636 (2d Cir. 1976) ("[T]he acceptance of the plea cannot be dealt with in a hasty or cavalier fashion. Fundamental constitutional rights are at stake, the loss of which could hardly be classified as insubstantial or harmless."); *United States v. Carter*, 619 F.2d 293, 295 (3rd Cir. 1980) (holding right to counsel at trial is core constitutional right). Yet Petitioner's request to open up the record to examine the defendant's state of mind at points *other than* at the time of the plea would vitiate a prime purpose of the

amended Rule 11; i.e., to establish a standardized procedure to guarantee certain minimum safeguards for ensuring that a defendant's voluntary and knowing waiver of important constitutional rights. *See McCarthy v. United States*, 394 U.S. 459, 464-65 (1969); *Gastelum*, 16 F.3d at 999 (limiting Rule 11(h) prejudice inquiry to plea transcript "ensures that a defendant is fully aware of his rights *when his plea is entered*—that he is aware of them *at the time they are being waived* . . . [and e]arlier or later knowledge is insufficient to provide that assurance") (emphasis in original)).

Further, the Rule 11(h) analysis urged by Petitioner has no limiting principle other than "relevance" in terms of time or quality of evidence that could be considered. To set some outer limits would require a raft of litigation and would likely create inconsistencies between the circuits regarding enforcement of the rule.[11]

C. Narrow Rule 11(h) Interpretation Protects the Integrity of the Guilty Plea Process.

Given the growing acceptance and reliance of state and federal courts on plea agreements between prosecutors and

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[11] Petitioner, for example, does not indicate whether the reviewing court would be limited temporally; i.e., limited to looking at evidence a few days, weeks, or months from the plea hearing or whether the advice can be more dated—extending to defendant's prior experience in the criminal system. Nor has Petitioner detailed at what point the advice received becomes too far removed from the challenged plea as to be irrelevant for purposes of determining the validity of the plea. For instance, if the defendant was advised of his right to counsel previously, should the trial court be limited to only prior pre-trial conferences in the same matter, pre-trial conferences in related matters, the defendant's arraignment, his *Miranda* warnings upon arrest or placement in custody, advisements made in previous criminal cases, or his generalized criminal legal knowledge?

defendants, there is an increased need for a narrow application of Rule 11(h). It is important that there be public trust in the integrity of the plea hearing process, which requires that defendants are adequately informed of their rights at the time of the plea and that their guilty pleas are voluntarily, knowingly, and intelligently made. Equally important is the limitation of the Rule 11(h) standard such that when a trial court judge fails to advise a defendant of a constitutional right as mandated by Rule 11(c)(3), the prejudice inquiry into the harmlessness of the error be based solely on whether there is affirmative evidence of defendant's unequivocal understanding of the omitted constitutional right as reflected by the plea hearing record. Absent such a showing, the failure to so inform defendant cannot be deemed harmless error as it affects defendant's constitutional rights. Any other result would cause an increase in convoluted and inconsistent appellate rulings attempting to reconstruct defendants' mental state, which is not a task well suited to the appellate bench. This result, in turn, would diminish confidence in the plea hearing process.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit rendered below.

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APPENDIX

TABLE 1: FEDERAL GUILTY PLEA CONVICTION RATES, 1990-2000[1]

12-Month Period Ending	Total Defendants Convicted	Total Guilty Pleas Taken	Federal Guilty Plea Rate
12/31/1990	47,486	41,099	86.55%

[1] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-143499, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1990, at 31 tbl.3.1 (1993); U.S. SENTENCING COMM'N ANN. REP. 1991 app. B at 4; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-148949, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1992, at 37 tbl.3.1 (1996); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-160089, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1993, at 43 tbl.3.1 (1996); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-163063, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1994, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ-164259, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1995, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ172849, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1996, at 42 tbl.3.2 (1998); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 176328, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1997, at 42 tbl.3.2 (1999); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 180258, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998, at 54 tbl.4.2 (2000); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 186179, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1999, at 56 tbl.4.2 (2001); ADM. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2000, at 221 tbl.D-4.

12-Month Period Ending	Total Defendants Convicted	Total Guilty Pleas Taken	Federal Guilty Plea Rate
9/30/1991[2]	33,237	28,383	85.40%
12/31/1992	52,348	46,130	88.12%
12/31/1993	53,435	48,022	89.87%
9/30/1994	50,701	45,958	90.65%
9/30/1995	47,556	43,584	91.65%
9/30/1996	53,076	48,694	91.74%
9/30/1997	56,570	52,514	92.83%
9/30/1998	60,958	56,896	93.34%
9/30/1999	66,055	62,404	94.47%
9/30/2000	67,036	63,503	94.73%

[2] The Bureau of Justice Statistics did not produce a *Compendium of Federal Justice Statistics, 1991*. Consequently, figures for fiscal year 1991 come from the United States Sentencing Commission's 1991 annual report. The figure under the heading "Total Defendants Convicted" represents the number of defendants convicted and sentenced under the United States Sentencing Guidelines in fiscal year 1991. The figure under the heading "Total Guilty Pleas Taken" represents the number of the convictions resulting from either a plea of guilty or *nolo contendere*.

TABLE 2: SELECT STATE FELONY GUILTY PLEA CONVICTION RATES, 1988-1996[3]

Year	Defendants Convicted of Felonies	Total Felony Guilty Pleas Taken	State Felony Guilty Plea Rate
1988	667,366	610,218	91.44%
1990	829,344	751,993	90.67%
1992	893,630	820,662	91.83%
1994	872,217	773,384	88.67%
1996	997,970	905,957	90.78%

[3] PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, NCJ-126923, FELONY SENTENCES IN STATES COURTS, 1988, at 6 tbl.9 (1990); PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEP'T OF JUSTICE, NCJ-140186, FELONY SENTENCES IN STATES COURTS, 1990, at 8 tbl.9 (1993); PATRICK A. LANGAN & HELEN A. GRAZIADEI, U.S. DEP'T OF JUSTICE, NCJ-151167, FELONY SENTENCES IN STATES COURTS, 1992, at 9 tbl.9 (1995); PATRICK A. LANGAN & JODI M. BROWN, U.S. DEP'T OF JUSTICE, NCJ-163391, FELONY SENTENCES IN STATES COURTS, 1994, at 8 tbl.9 (1997); JODI M. BROWN ET AL., U.S. DEP'T OF JUSTICE, NCJ 173939, FELONY SENTENCES IN STATES COURTS, 1996, at 7 tbl.9 (1999).

TABLE 3: SELECT STATE SENTENCING ENHANCEMENT STATUTES

Jurisdiction	Provision(s)	Enhancement
Alabama	Alabama Criminal Code § 5-9(c)(3), (4) ALA. CODE § 13A-5-9(c)(3), (4) (Supp. 2000)	Life imprisonment for conviction of Class A felony if defendant has at least three prior felony convictions; no possibility of parole if at least one of the prior convictions is for a Class A felony
Alaska	ALASKA STAT. § 12.55.125(*l*) (Michie 2000)	Mandatory prison term from forty to ninety-nine years for Class A or unclassified felonies for defendants with at least two serious felony convictions
Arizona	ARIZ. REV. STAT. §13-604.S (2001)	Life imprisonment for third conviction of serious offense for defendants with at least two prior convictions of serious offenses; no probation for first twenty-five years in most cases

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Arkansas	Arkansas Criminal Code § 4-501(c)(1), ARK. CODE ANN. § 5-4-501(c)(1) (Michie repl. vol. 1997) (amended 2001)	Mandatory forty-year minimum sentence for second serious felony involving violence
California	Penal Code of California § 667(e)(2)(A), CAL. PENAL CODE § 667(e)(2)(A) (West 1999)	Mandatory indeterminate sentence of life imprisonment for felony conviction with least two prior felony convictions; the minimum sentence is either three times the sentence the conviction would have otherwise received, twenty-five years, or the sentence as determined by the court under section 1170 of the state penal code

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Colorado	Colorado Code of Criminal Procedure § 13-101(1), (1.5), COLO. REV. STAT. § 16-13-101(1), (1.5) (2000)	Life imprisonment for third class 1, class 2, or violent class 3 felony conviction; treble the maximum term for third nonviolent class 3, class 4, or class 5 felony conviction
Connecticut	Penal Code § 40(a), (h), CONN. GEN. STAT. § 53a-40(a), (h) (1999) (amended 2001)	Maximum sentence of forty years for third dangerous felony
Delaware	DEL. CODE ANN. tit. 11, § 4214(b) (Supp. 2000)	Life imprisonment for conviction of third serious felony as enumerated in the statute
District of Columbia	D.C. CODE ANN. § 22-104a(a) (Supp. Sept. 2000)	Life imprisonment for third felony conviction; life imprisonment without parole for third violent felony conviction

Jurisdiction	Provision(s)	Enhancement
Florida	FLA. STAT. ch. 775.084(1)(a) 1., (4)(a)1. (1993) (amended 1995, 1996, 1997, 1998, 1999, 2000)	Life imprisonment for first-degree felony for defendants with at least two prior felony convictions; enhanced sentences for third instance of second and third degree felonies
Georgia	GA. CODE ANN. § 17-10-7(b)(2) (1997)	Life without parole for second serious violent felony
Idaho	IDAHO CODE § 19-2514 (Michie repl. vol. 1997)	Third felony conviction requires a sentence between five years and life
Illinois	Criminal Code of 1961 § 33B-1(a), (e), 720 ILL. COMP. STAT. § 5/33B-1(a), (e) (2000)	Life imprisonment for Class X felonies, criminal sexual assault, or first-degree murder when defendant has at least two convictions of Class X felonies, criminal sexual assault, first-degree murder, or aggravated kidnaping

Jurisdiction	Provision(s)	Enhancement
Indiana	IND. CODE § 35-50-2-8.5 (a) (1998)	Life imprisonment without parole for third serious felony conviction
Kansas	Kansas Criminal Code § 21-4504(a), (b), KAN. STAT. ANN. § 21-4504(a), (b) (1995)	Double the minimum term for the second felony conviction as enumerated by statute; treble the minimum term for the third felony conviction as enumerated by statute; enumerated crimes are crimes against persons, sex offenses, and crimes affecting family relationships or children
Kentucky	Kentucky Penal Code § 532.080(6), KY. REV. STAT. ANN. § 532.080(6) (Banks-Baldwin Supp. 2000)	First degree persistent felony offenders convicted of Class A or B felonies sentenced to maximum of twenty to fifty years or life imprisonment; if convicted of Class C or D felony, sentence is ten to twenty years

Jurisdiction	Provision(s)	Enhancement
Louisiana	LA. REV. STAT. ANN. § 15:529.1.A(1) (b)(ii) (West Supp. 2001)	Life imprisonment without parole when the current felony and at least two prior felony convictions are of a violent nature
Maryland	MD. ANN. CODE art. 27, § 643B(c) (Supp. 2000)	Mandatory minimum of twenty-five years for a third crime of violence
Massachusetts	MASS. GEN. LAWS ch. 279, § 25 (2000)	Habitual criminals twice convicted of crimes carrying sentence of three years or more shall be imprisoned for the maximum term provided by law as a penalty for the felony for which he or she is then to be sentenced
Minnesota	Criminal Code of 1963 § 609.1095 subdivision 2, MINN. STAT. § 609.1095 subdivision 2 (1998)	Provides for upward departure to statutory maximum sentence when defendant has at least two prior violent felony convictions

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Mississippi	MISS. CODE ANN. § 99-19-83 (rev. 2000)	Life imprisonment without parole for a third felony if any of the felony convictions was a crime of violence
Missouri	MO. REV. STAT. § 558.019.2 (2000)	Provides minimum prison terms for non-dangerous felony convictions that vary depending on defendant's prior felony convictions
Montana	MONT. CODE ANN. §§ 46-18-501, -502(2) (1999)	Convicted persistent felony offender—at least two prior felonies—can receive sentence between ten and one hundred years, a $50,000 fine, or both
Nebraska	NEB. REV. STAT. § 29-2221(1)(a) (reissue 1995)	Third felony conviction results in sentence from twenty-five to sixty years where current felony and at least one of the prior felonies violates specific statutory provisions

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Nevada	NEV. REV. STAT. § 207.010(b)(1) (1999)	Mandatory minimum sentence ranging from twenty-five years to life without parole for fourth felony conviction
New Hampshire	Criminal Code § 651:6.I(c), .II(a), N.H. REV. STAT. ANN. § 651:6.I(c), .II(a) (Supp. 2000)	Mandatory sentence of ten to thirty years for conviction for non-murder felony where defendant has been convicted twice, in any jurisdiction, and the prior sentences carried terms of imprisonment of more than one year
New Jersey	Persistent Offenders Accountability Act § 2(a), N.J. STAT. ANN. § 2C:43-7.1.a (West 1995)	Life imprisonment without parole for third violent felony conviction
New Mexico	Criminal Sentencing Act § 23(A), N.M. STAT. ANN. § 31-18-23.A (Michie 2000)	Life imprisonment for third violent felony conviction

Jurisdiction	Provision(s)	Enhancement
New York	Penal Law § 70.10.1(a), .2, N.Y. PENAL LAW § 70.10.1(a), .2 (McKinney 1998)	Imposes sentence authorized for a class A-1 felony when defendant has been previously convicted of at least two felonies
North Carolina	N.C. GEN. STAT. § 14-7.7, .12 (1999)	Life imprisonment without parole for third violent felony conviction
North Dakota	North Dakota Criminal Code § 32-09.1.c, .2, N.D. CENT. CODE § 12.1-32-09.1.c, .2 (repl. 1997) (amended 2001)	Enhanced sentence of ten years to life for third felony conviction
Ohio	OHIO REV. CODE ANN. § 2929.14(A), (D)(2)(a) (Anderson Supp. 2000)	Sentence for a repeat violent offender may be enhanced up to ten years

Jurisdiction	Provision(s)	Enhancement
Oklahoma	Penal Code of the State of Oklahoma § 51.1.B, OKLA. STAT. ANN. tit. 21, § 51.1.B (West Supp. 2001)	Mandatory twenty year minimum sentence for a third felony
Pennsylvania	Sentencing Code § 14(a)(2), 42 PA. CONS. STAT. § 9714(a)(2) (Supp. 2000)	Mandatory twenty-five year minimum sentence for third crime of violence
Rhode Island	R.I. GEN. LAWS § 12-19-21(a), (b) (reenactment 2000)	Up to twenty-five year enhancement for third felony conviction
South Carolina	S.C. CODE ANN. § 17-25-45(A), (B) (Law. Co-op. Supp. 2000)	Life imprisonment without parole for a third conviction of a serious offense or a second conviction of a most serious offense as outlined in statute

Jurisdiction	Provision(s)	Enhancement
Tennessee	Tennessee Criminal Sentencing Reform Act of 1989 § 120(a), (g), TENN. CODE ANN. § 40-35-120 (repl. 1997)	Mandatory life imprisonment without parole for repeat violent offenders
Texas	Penal Code § 12.42(d), TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 2001)	Mandatory sentence between twenty-five and ninety-nine years for third felony conviction
Utah	Utah Criminal Code § 3-203.5(1)(b), (2), UTAH CODE ANN. § 76-3-203.5(1)(b), (2) (Supp. 2000); *id.* § 3-408, UTAH CODE ANN. § 76-3-408 (repl. 1999)	Habitual offenders convicted of violent felonies subject to various sentence enhancements depending on the nature of the offense; life imprisonment without parole for third conviction involving sex offense

Jurisdiction	Provision(s)	Enhancement
Vermont	VT. STAT. ANN. tit. 13, § 11a(a), (c) (1998)	Court may sentence defendant up to life imprisonment for third non-murder felony conviction
Virginia	VA. CODE ANN. § 19.2-297.1.A (Michie repl. vol. 2000)	Life imprisonment without parole for third conviction involving an act of violence
Washington	Sentencing Reform Act of 1981 §§ 3(31), 56, WASH. REV. CODE §§ 9.94A.030 (31); .560 (2000)	Life imprisonment without parole for persistent offender convicted of third violent felony
West Virginia	W. VA. CODE § 61-11-18(c) (repl. vol. 2000)	Life sentence for third felony conviction

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Wisconsin	Criminal Code § 939.62(2m) (b), (c), WIS. STAT. § 939.62(2m) (b), (c) (1997-1998)	Life imprisonment without parole for third serious felony conviction
Wyoming	Wyoming Criminal Code § 10-201, WYO. STAT. ANN. § 6-10-201 (Michie 1999)	Mandatory sentence of ten to fifty years for conviction of violent felony with at least two prior felony convictions; mandatory sentence of life for conviction of violent felony with at least three prior felony convictions